



IN THE
Supreme Court of the United States

October Term, 1976

No. 76-1620

THOMAS A. HARNETT, as Superintendent of Insurance
of the State of New York,
Petitioner,
against

**HAROLD D. AZZARO, SAMUEL GALLO, GERALD HAND-
LEY, SAMUEL RUBIN, BEN CILIBERTO and JACK
SCHUMAN**, as Trustees of Bakery Drivers Local 802 Pension
Fund,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION.

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HAROLD D. AZZARO, SAMUEL GALLO, GERALD HANDLEY,
SAMUEL RUBIN, BEN CILIBERTO and JACK SCHUMAN, as
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Question Presented

Whether the Court of Appeals correctly concluded that the mere accumulation of pension credits does not constitute a "cause of action which arose, or any act or omission which occurred before January 1, 1975" which would give the Insurance Department of the State of New York

ongoing jurisdiction over a pension plan within the meaning of Section 514(b)(1) of the Employee Retirement Income Security Act of 1974.

Statement of the Case

This case arose out of a dispute between the Trustees of the Bakery Drivers Local 802 Pension Fund ("the Trustees" and "the Pension Fund") and the Insurance Department of the State of New York ("the Insurance Department") concerning the jurisdiction of the Insurance Department under Section 514 of the Employee Retirement Income Security Act of 1974 [29 U.S.C. § 1144] ("ERISA") to require the Trustees to supply information as to the pension credit of an employee.

Section 514 of ERISA states in pertinent part:

"(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975."

By a letter to the Insurance Department dated March 24, 1975, an employee inquired with respect to the status of his pension credit (A. 50a-52a).^{*} No previous inquiry had been made to the Insurance Department or to the Trustees.

^{*} Page references to the Petition for a Writ of Certiorari are cited as "Pet." References to the Appendix to the Petition are cited as "Pet. App." References to the Appendix to the Court of Appeals are designated "A."

The Insurance Department requested, by a letter dated April 25, 1975, that the Trustees provide detailed information concerning the pension benefit status of the employee (A. 23a).^{*}

The Trustees replied to the Insurance Department request by a letter dated June 2, 1975 stating that the Insurance Department letter of April 25, 1975:

"... was the first occasion on which the matter had been brought to the attention of the Trustees,"

and requesting the Insurance Department to advise them as to the basis of its jurisdiction:

"... in view of the fact that Section 514 of ERISA provides that the federal law supersedes state law except as to 'any cause of action which arose, or any act or omission which occurred, before January 1, 1975' ". (A. 24a)

The Insurance Department responded by a letter dated June 5, 1975 that:

"Inasmuch as almost all of [the employee's] pension credits were earned or accumulated prior to January 1, 1975, this Department has not been superseded in this matter." (25a)

^{*} The Insurance Department requested a copy of the Pension Fund benefit booklet; a summary of the employee's work record while a member of the union; a statement of the effect of his employment by another local of the same union upon his pension status; a statement of any provisions of the Pension Fund plan concerning vesting of pension benefits; and a statement of the effect of any applicable vesting provision on his pension status (A. 23a).

The Trustees replied by a letter dated June 11, 1975:

"... that the earning of Pension Credit prior to January 1, 1975 does not of itself constitute a 'cause of action which arose, or any act or omission which occurred, before January 1, 1975' within the meaning of Section 514 of ERISA." (A. 26a)

The Trustees also pointed out that if the Insurance Department's construction of Section 514 of ERISA were adopted:

"... the jurisdiction of the various States would continue indefinitely regardless of the commission of any wrongful act by administrators of Pension Funds prior to January 1, 1975." (A. 26a)

On July 2, 1975, the Associate General Counsel of the Insurance Department requested the Trustees to reconsider their position and warned:

"If the ... Trustees' position remains unchanged, this Department will have to consider the issuance of a Citation against them for willfully violating the Insurance Law ... which can result in the imposition of penalties not to exceed \$2,500 upon trustees and/or their removal from office, or both such penalty and removal." (A. 11a)

The Trustees informed the Insurance Department by a letter dated July 24, 1975 that they had:

"... decided to adhere to their position as previously stated, on the ground of the exclusive jurisdiction of the federal government." (A. 30a)

On August 5, 1975, the Trustees commenced this action against the Superintendent of Insurance of the State of

New York ("the Superintendent of Insurance") in the United States District Court for the Southern District of New York in response to the threat by the Insurance Department to proceed against them under the New York Insurance Law (A. 2a-15a).

The Trustees' action sought a declaration of the rights and obligations of the Trustees with respect to the subject matter of the action. The action also sought to enjoin the Superintendent of Insurance from further inquiry concerning the employee, and to prevent imposition of fines upon the Trustees or their removal from office by the Superintendent of Insurance.

By an opinion dated June 3, 1976, the district court granted a motion for summary judgment by the Trustees in all respects (Pet. App. 3a-7a; 8a-9a). In response to the Trustees' demand for a declaratory judgment the Court found no cause of action, act or omission existed prior to January 1, 1975 and held that Section 514(b)(1) of ERISA [29 U.S.C. § 1144(b)(1)]:

"... is obviously not intended to permit continuing state regulation and investigation based solely upon the fact that pension credits were accumulated prior to January 1, 1975." (Pet. App. 7a)

The Court enjoined the Superintendent of Insurance from:

"... instituting or maintaining any criminal prosecution or any civil action or proceeding against the [Trustees] by reason of any alleged violation of the Insurance Law of the State of New York pertaining to [the employee]." (Pet. App. 9a)

The Court of Appeals affirmed the judgment of the district court on February 18, 1977 (Pet. App. 1a-2a). In announcing its affirmance of the district court, the Court of Appeals stated that it affirmed upon the opinion of the district court.

ARGUMENT

The New York State Insurance Department's petition for a writ of certiorari is patently without merit. There is no question of national import, no division among the Circuit Courts, no dubious question as to the interpretation of a federal statute involved in this case. The unanimous decision of the Court of Appeals for the Second Circuit, which affirms, on the opinion below, the judgment of the district court is routine. It determines a simple and obvious matter. It presents no occasion for the exercise of certiorari by this Court.

In setting forth the alleged reasons for granting the writ the petition concedes:

"Petitioner does not claim that the earning of pension credits constitutes a 'cause of action' or an 'act or omission' within the meaning of [ERISA] § 514(b)." (Pet. 5);

and also concedes:

"In the instant case, it is not even clear whether the trustees' conduct has given rise to a cause of action by reason of their acts or omissions prior to January 1, 1975." (Pet. 6)

The record is clear that no dispute arose, no claim was ever made, nor was there ever any inquiry by the employee in question prior to January 1, 1975. Out of such a vacuum the Insurance Department, in its search for jurisdiction, has sought to raise the ghost of a "cause of action . . . or act or omission which occurred before January 1, 1975." The effort has been futile.

No coherent rationale for the Insurance Department's position can be found. It has strained to justify an asser-

tion of jurisdiction which, if allowed, would encompass every pension fund in which any employee had earned one day of pension credit prior to January 1, 1975, if such an employee thereafter asked to have his pre-1975 credit verified. It is not difficult to predict that such a grant of jurisdiction would keep the Insurance Department of the State of New York, and similar agencies of other states, in the pension business indefinitely, contrary to the plainly expressed intent of Congress.*

For want of logic the petition unhappily resorts to offensive language inappropriate to the high purpose of certiorari. The Respondent Trustees are accused of "stonewalling" and of "obstinate refusal to give any information (as if they, in fact, had something to hide). . . ." (Pet. 6) This language is untrue as well as inappropriate. The record shows that the Trustees wrote to the Insurance Department inquiring as to the basis on which it asserted jurisdiction (24a), and that when the Insurance Department stated that its claim was based simply on the accumulation of pension credits prior to January 1, 1975 (25a) the Trustees commenced this action for a declaratory judgment. Such conduct does not justify a derogatory characterization.**

The position stated in writing to the Trustees by the Insurance Department in regard to the basis for its asser-

* The Respondents have never argued nor have the courts below found that the time a complaint is "lodged with the State" is controlling. What is controlling is the time the cause of action or act or omission arose. The petitioner's contention (Pet. 5) is an obvious distortion of the record.

** The petition speciously argues that "the provision of the final judgment prohibiting any criminal proceedings (9a) is erroneous on its face" (Pet. 6). What has been prohibited is punishment of the Trustees solely by reason of their challenge to the Insurance Department's jurisdiction. The State's power to enforce its criminal laws is not in question.

tion of jurisdiction, by letter dated June 5, 1975 (25a), has now been explicitly abandoned. The Petition states:

"Petitioner does not claim that the earning of pension credits constitutes a 'cause of action' or an 'act or omission' within the meaning of [ERISA] § 514(b)." (Pet. 5)

With the abandonment of this contention not even an arguable basis for state jurisdiction remains. The Court below correctly concluded:

"Section 1144(b)(1) is obviously not intended to permit continuing state regulation and investigation based solely upon the fact that pension credits were accumulated prior to January 1, 1975. A contrary result would create a chaotic condition in this field and violate the whole purpose of ERISA.

There is no cause of action existing prior to January 1, 1975 involved in this case. There is no showing of an act or omission by plaintiffs with respect to the Pension Fund member prior to that date. The Insurance Department was seeking to investigate the *present status* of the member who wished to know if he is now credited by his pension plan for a year's employment with another Teamsters' Union as well as for his employment with the Bakery Drivers Union.

In order to prevent this contravention of the purpose of ERISA, the exception to federal regulation provided in Section 1144(b)(1) must be narrowly construed to limit state regulation to what is essentially a cleanup role, that is, to the disposition of causes of action and disputes with respect to employee benefit plans existing before January 1, 1975." (Pet. App. 7a)

Petitioner's assertion that the decision below "ignores" the "generally accepted rule" regarding the prospective operation of statutes (Pet. 7) is baseless. The decision of the district court, affirmed by the Court of Appeals, scrupulously observes the intent of Congress to reserve to the States "what is essentially a cleanup role" (Pet. App. 7a).

Equally baseless is the petitioner's assertion that the decision below violates "the national policy which reserves the regulation of insurance to the States" (Pet. 5). National policy is expressed by Congress. Section 514(b)(2)(A) and (B) of ERISA [29 U.S.C. § 1144(b)(2)(A) and (B)] deals with the question explicitly.* This case does not remotely involve the "regulation of insurance companies" by the States within the meaning of the statute.

Petitioner's claim that "the legislative history relied upon by respondents and the courts below is inapposite" (Pet. 7) is also meritless. The legislative history of ERISA cited by the district court clearly shows that Congress intended broadly to preempt the field of employee benefit plan regulation. As stated in the introduction to the conference report on ERISA by Senator Harrison A. Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare:

"It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or

* Section 514(b)(2)(B) expressly provides that "[n]either an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any state purporting to regulate insurance companies [or] insurance contracts . . ." (Pet. 3).

inconsistent State and local regulation of employee benefit plans." (Pet. App. 5a; [1974] U.S. Code Cong. & Admin. News 5188-89).

Other portions of the legislative history also support this view. See *e.g.*, [1974] U.S. Code Cong. & Admin. News 4650, 4854, 4655.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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